SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 152.

SAMUEL W. CURRIDEN, APPELLANT,

vs.

FRANK L. MIDDLETON, HENRY S. BLACKMORE, AND WILLIAM G. ORR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

Statement of the Case.

This is an appeal from the judgment of the Court of Appeals of the District of Columbia affirming a decision of the Supreme Court of the District of Columbia, which court entered an order sustaining a demurrer to the amended bill filed in said court and dismissing said amended bill on the ground that the plaintiff, as alleged in said demurrer, had a plain, adequate and complete remedy at law. No service

was ever had upon the defendants Blackmore and Orr, who are therefore not before the court, and the demurrer having been interposed only by the defendant Middleton, the bill is to be considered as a bill against him alone.

The Court of Appeals, in affirming the decision of the lower court, disposed of only two grounds set up in the demurrer in the court below, to wit, that there was a complete remedy at law and that the bill could not stand alone as a bill for discovery merely. The Supreme Court of the District of Columbia, however, held that there was an additional ground for sustaining the demurrer and dismissing the bill, namely, that the proceeding was barred by the statute of limitations as set forth in section 1265 of the Code of the District of Columbia.

The bill as analyzed by the lower court discloses that the only relief sought is a money decree against the defendant, because of his alleged fraud and deceit, upon the faith of which the plaintiff made certain investments in a fluid called "Aromaform" and an apparatus by which said fluid could be used for disinfecting purposes. The investment of the plaintiff was made through the medium of a corporation which had been organized for the purpose of manufacturing and selling both the fluid and apparatus.

Assignment of Error.

While appellant has assigned several errors (R., 31), yet the same may be resolved into the single proposition that the court below erred:

In holding that the appellant had a plain, adequate and complete remedy at law as to the matters complained of in his amended bill.

ARGUMENT.

I.

Adequate Remedy at Law as to Substantial Relief Sought.

Analysis of the bill discloses that it is filed to recover damages growing out of alleged fraudulent misrepresentations made by the defendant Middleton, and incidentally seeks a discovery from him in respect of these misrepresentations.

The bill should not be permitted to stand in either case: first, because the plaintiff has a plain and adequate remedy at law, and, secondly, because as a bill of discovery merely it cannot stand, the information sought to be obtained thereby being equally available under ordinary legal process in an action at law.

It is manifest from a perusal of the bill that if the plaintiff should be ordered by this court to be reinstated in all his rights growing out of the alleged fraudulent misrepresentations of the defendant Middleton the *only relief he could have in this suit would be a decree for damages to be assessed by the same rules as in an action at law.*

> "The effect of the provisions of the Judiciary Act, as often stated by this court, is that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."
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> "In case of fraud or mistake a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received."
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> Buzard *vs.* Houston, 119 U. S., 347, 351, 352.
> Parkersburg *vs.* Brown, 106 U. S., 487, 500.
> Litchfield *vs.* Ballow, 114 U. S., 190.

> "If, as is more than once distinctly alleged, the object of the suit is to recover damages for an unlawful and fraudulent conspiracy to cheat Ambler out of his interests in the original invention which is the subject-matter of the controversy, the remedy is clearly at law, and not in equity."
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> Ambler *vs.* Chateau, 107 U. S., 590.

One of the latest utterances of this court is to be found in the case of United States *vs.* Bitter Root Development Company, 200 U. S., 472, where the court said:

> "It is not necessary to cite many authorities for the proposition that where the main cause of action is of a legal nature, equity has no jurisdiction, provided the complainant has full and adequate remedy at law for the wrongs complained of."

Other authorities of this court directly in point are: Hipp *vs.* Babin, 19 How., 271, 278; Kramer *vs.* Cohn, 119 U. S., 355, 357; Whitehead *vs.* Shattuck, 138 U. S., 146; Scott *vs.* Neely, 140 U. S., 106, 110; Cates *vs.* Allen, 149 U. S., 451, 459.

The case of Tyler *vs.* Savage, 143 U. S., 79, is relied on by appellant, the plaintiff below, but as this court pointed out in the case of U. S. *vs.* Bitter Root Development Co., *supra,* there was in that case discovery, account, fraud, misrepresentation, and concealment; there was also an application for the appointment of a receiver to administer the assets of the corporation under the direction of the court and for an injunction restraining the company and its officers from managing or interfering with its affairs. From the foregoing it will be observed that the facts stated in the plaintiff's bill in the case at bar are entirely different from those supporting the equity jurisdiction in the case of Tyler *vs.* Savage.

The appellant in his brief (pp. 17, 18) concedes that the case at bar may be differentiated from the Tyler-Savage case, in that in the latter there was an application for an in-

junction, for a receivership, and a demand that the plaintiff's money should be made a debt of the corporation, and that the assets of the corporation should be realized quickly, in addition to an accounting of all the moneys received by the defendants. The only excuse offered by appellant in thus wholly failing to bring the averments of his bill within the principle of the Tyler-Savage case consists in a statement on page 18 of his brief:

> "In due time all these methods of an equitable remedy are likely to be asked for."

In making the foregoing statement, which practically concludes the case against him, the appellant loses sight of the fact that in the trial court he expressly stood upon his bill as amended, and cannot now be heard to change his cause of action by inserting jurisdictional averments that do not appear in his amended bill of complaint, which was dismissed for want of jurisdiction.

II.

The Bill Cannot be Maintained for Discovery Only.

Appellant urges *discovery* as a second ground upon which a court of equity may entertain jurisdiction of his bill, but it is significant that at the time he filed his bill, as set forth therein (R., 14)—

> "He was not and is not sufficiently sure of the facts to make him willing to begin an action at law and invoke a trial by jury."

And again (R., 14) he makes the astounding averment that—

> "He was duly advised by counsel whom he consulted that, being in doubt whether the facts known to him would give him a complete right of action, based upon the alleged frauds committed by the defend-

> ants, and realizing that such facts and others connected therewith were complicated and ascertainable only from an examination of books and papers in the possession of the defendants, and by disclosures as aforesaid, therefore he was entitled to the assistance of a court of equity to obtain a disclosure by the defendants, in due course, of all pertinent facts and to obtain access to such books and papers and make an examination thereof."

It is nowhere averred that he was ever denied access to the books and papers of the company, which he states in the bill (R., 9) to be in the possession and control of the defendant Middleton, nor is it anywhere charged that a demand was ever made for their inspection.

Section 1072 of the Code of the District of Columbia provides:

> "In an action at common law the court may, on motion, and on reasonable notice thereof, require the parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery."

And in this connection the learned justice at the trial below uses the following language (R., 24), which is quoted in part by the Court of Appeals in its opinion (R., 29):

> "Furthermore, it is strongly urged that the bill seeks a discovery. The answer made to this is, first, that such discovery as is asked for, is only incidental to such relief as might be had at law and is for that reason an insufficient ground; and in the next place, that a statute now existing enables the plaintiff to secure all the discovery he is asking for by proper process at law. Code, sec. 1072. There seems to be some conflict in the authorities touching the first of these propositions, but touching the second proposition, the later cases, particularly those in the

> Supreme Court of the United States, seem to be with the defendant. Courts of equity are not inclined to maintain a bill merely for purposes of discovery at the present day where the statutes have afforded ample means of procuring the evidence in an action at law; and this seems to be the sound view of the matter. The defendant is entitled under the Constitution to a trial by jury of matters strictly cognizable at law. In the present case the plaintiff himself states that he does not feel sure enough of his ground to institute an action at law, and for that very reason wishes to know what the defendant will say. This is an admission that the present bill is an attempt to get the defendant committed upon various questions of fact before instituting legal proceedings, although the plaintiff does not pretend that he is ignorant of any of the matters of fact which he makes the basis of the bill."

The correctness of the foregoing principles announced by the learned trial court is abundantly established in the case of United States *vs.* Bitter Root Development Company, *supra*, where the complainant invoked the jurisdiction of a court of equity for the wrongful cutting, carrying away and conversion of timber from the public domain upon the theory that the remedy at law was inadequate because of the various devices resorted to by the principal tort-feasor by way of covering up its tracks through the organization of different corporations, thus rendering it more difficult for the complainant to prove its case. In that case the opinion, written by Mr. Justice Peckham, laid down the following principles on pages 472 and 473, which are singularly pertinent to the averments of the bill in the case at bar:

> "The principal ground upon which it is claimed that the remedy at law is inadequate is really nothing more than difficulty in proving the case against the defendants. The bill shows that whatever was done in the way of cutting the timber and carrying it away was done by the defendants as tort-feasors, and the various devices alleged to have been resorted to by the

> deceased, Daly, by way of organizing different corporations, in order to, as alleged, cover up his tracks, and to render it more difficult for the complainant to make proof of his action, does not in the least tend to give a court of equity jurisdiction on that account. It is simply a question of evidence to show who did the wrong and upon that point the fact could be ascertained as readily at law as in equity. The complainant is entitled in an action at law to an inspection of the books and records of these various corporations, and it has the same power to obtain the facts therefrom in that action as it would have in this suit in equity."

Discovery may not be claimed in a bill to save the expense or uncertainty in the proof of the case and may not be used as a ground of equity jurisdiction for ulterior purposes, in which case it would be sufficient to bring any case, proper only for a court of law, into equity to call for the discovery of facts from the defendant.

> "The American courts in view of the foregoing *reductio ad absurdum* have laid down the principle that a party going into equity for discovery alone *must allege in his bill and verify the allegation by affidavit,* that he has no other means of proving his case."
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> Gelston *vs.* Hoyt, 1 Johns. Ch., 543.
> Bank of U. S. *vs.* Biddle, 3 Pars. Ch., 31.
> Lyons *vs.* Miller, 6 Gratt., 427, 428.

III.

The Action is Barred by the Statute of Limitations and the Appellant Has Lost His Remedy Even at Law by Reason of His Own Laches.

A third ground for sustaining the demurrer and the dismissal of the bill was found by the trial court (R., 24) in section 1265 of the Code of the District of Columbia, which

fixes the period of limitations upon actions of this character at three years, the court holding that this statute is a bar to a proceeding at law where it appears that the alleged fraud was discovered more than three years before the beginning of the action.

The case of Kirby *vs.* Lake Shore R. R. Co., 120 U. S., 130, 136, cited by the appellant in support of his contention, decided only that time will not run in favor of the defendant until the discovery of the fraud.

Taking the view most favorable to the plaintiff upon this point, it appears in paragraphs 13 and 14 of the bill (R., 5, 7) that the plaintiff had knowledge of the alleged fraud of the defendant in January, 1906, whereas the bill was not filed (R., 1) until April 4, 1910, nearly a year after the claim had been barred by limitations.

If the appellant seeks to avoid the operation of the statute on the ground that the alleged fraud was not discovered by him until after that time, the bill wholly fails in this respect, because there is no definite allegation as to when the fraud was discovered. The inference, however, is conclusive that it was prior to January 16, 1906, at which time appellant concluded an arrangement with the company whereby the latter undertook to exonerate him from his liability existing at that time. Taking this latter date as the time when the alleged fraud was discovered, more than three years elapsed before the filing of the bill.

> "Equitable powers will not be exercised to discover whether one has been wronged, when, with full knowledge of the facts, he has allowed the bar of the statute to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief."
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> Baker *vs.* Cummings, 169 U. S., 189, reversing 4 App. D. C., 230, and 8 App. D. C., 515.

"If it appear on the face of the pleadings that the

claim is barred by the statute of limitations, the defect may be taken advantage of by demurrer."

Mercantile National Bank *vs.* Carpenter, 101 U. S., 567.
Rhode Island *vs.* Massachusetts, 15 Pet., 233.
Coddington *vs.* Penn., &c., R. Co., 103 U. S., 409.
Kindall *vs.* U. S.. 107 U. S., 123.
Chenning Canal Bank *vs.* Lowery, 93 U. S., 72.

So with laches.

Spiedel *vs.* Henrici, 120 U. S., 377.
Bryan *vs.* Kales, 134 U. S., 126.
Lansdale *vs.* Smith, 106 U. S., 391.

It is manifest from appellant's brief that in his own judgment there is no ground upon which jurisdiction of an equity court can be maintained. On pages 1 and 2 of his brief the following statement appears:

> "The appellant's counsel, who have only recently fully realized the growing disposition of trial courts to discourage suits in equity, which seems to almost change the rule that such a suit may be brought where there is not at law a remedy plain, adequate and complete, to a rule that such a suit shall not be brought if by any possibility a remedy can be had in a suit at law, hereby state that they desire, if necessary, to avail their client of the privilege given by the new equity 'Rule of Practice for the Courts of Equity No. 22,' and to have his case transferred to the law side of the court below and there proceeded with. Rather than be barred by the statute of limitations, if the full conclusion of the courts below is sustained, they will endeavor to maintain their claim by so framing issues at law as to entitle them to a recovery."

Again appellant states on pages 6 and 7 of his brief as follows:

> "The plaintiff did not bring his suit in equity rather than at law because any period of limitations had run against his claim, but only because his counsel believed the equitable grounds for relief set forth in the bill entitled him to a remedy therein. *He had not then discovered the extent to which courts in recent years had swung away from suits in equity in connection with the improved facilities for making suits at law effective.*"

It is not apparent to the appellee how appellant can rely upon equity rule No. 22 as promulgated by this court on November 4, 1912, for the reason that such rules by their terms apply to procedure in courts of equity and not to procedure in appellate courts, and particularly in this court. This conclusion is also apparent from the language of equity rule No. 81, which provides that said rules shall—

> "govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice."

It is manifest, therefore, first, that rule 22 invoked by the appellant has no application to the case at bar, and, secondly, that to invoke the same, in any event, would do an injustice to the appellee, for the reason that the application of the rule is invoked for the first time in this court, whereas the judgment of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of the District of Columbia was passed on December 4, 1911, more than a year before the aforesaid equity rules became effective, which was on February 1, 1913.

It is therefore respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

E. HILTON JACKSON,
Attorney for the Appellee.